

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

<b>KEVIN GUIDI, et al.,</b>	)	
	)	
<b>Plaintiffs</b>	)	
	)	
<b>v.</b>	)	<b>Docket No. 01-96-P-C</b>
	)	
<b>EUGENE JORDAN, et al.,</b>	)	
	)	
<b>Defendants</b>	)	

**RECOMMENDED DECISION ON DEFENDANT JORDAN'S  
MOTION TO REMAND**

Defendant Eugene Jordan moves to remand this action to the Maine Superior Court, from which it was removed by the other defendant, the town of Turner, Maine, asserting that this court lacks jurisdiction over the subject matter of the action. I recommend that the court grant the motion.

The defendant who removes an action from state court to federal court bears the burden of demonstrating the existence of subject matter jurisdiction. *Danca v. Private Health Care Sys., Inc.*, 185 F.3d 1, 4-5 (1st Cir. 1999). If this court lacks subject matter jurisdiction, the case must be remanded. 28 U.S.C. § 1447(c).

The complaint asserts two claims: a state-law nuisance claim against defendant Jordan (Count I) and a claim under 42 U.S.C. § 1983 against defendant town of Turner (Count II). Complaint, attached to Notice of Removal (Docket No. 1). Count II is the only possible source of jurisdiction in this court because the parties are all Maine residents or entities, making diversity jurisdiction unavailable. Count II invokes section 1983 and the Fourteenth Amendment of the United States Constitution. *Id.* ¶ 10. It alleges that the defendant town was the owner of real property on which

defendant Jordan “carried on” “nuisance activities” and therefore was obligated to terminate such activities, which “have effected a partial taking of plaintiffs’ property without due process of law.” *Id.* ¶¶ 14-15. Jordan contends that this count can only be read as a “takings” claim under the Fifth Amendment and, as such, must first be brought in state court, citing *Williamson County Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). Defendant Jordan’s Statement of Non-Opposition, or in the Alternative, Motion to Remand, etc. (“Motion”) (Docket No. 28) at 3-4. “[I]f provision for compensation exists by means of an inverse condemnation proceeding, a ‘taking’ effected by an excessive regulation does *not* violate the due process clause.” *Culebras Enters. Corp. v. Rivera Rios*, 813 F.2d 506, 515 (1st Cir. 1987).<sup>1</sup> See also *Lerman v. City of Portland*, 675 F. Supp. 11, 15 (D. Me. 1987) (just compensation claim under federal constitution barred if plaintiff has not pursued state remedies). The parties agreed at oral argument that any “takings” claim or any claim of a substantive due process violation arising out of a “takings” claim, without more, does not provide this court with subject matter jurisdiction. See *Currier Builders, Inc. v. Town of York*, 2001 WL 823645 (D. Me. July 20, 2001) at \* 7 (recommended decision, affirmed Sept. 4, 2001, Docket No. 19). The town also concedes this point in its written opposition to the motion. Defendant Town of Turner’s Objection to Defendant Jordan’s Motion for Remand, etc. (“Town’s Opposition”) (Docket No. 43) at 2.

At oral argument, counsel for the plaintiffs, who do not oppose this motion, Plaintiffs’ Response to Defendant Jordan’s Motion to Remand (Docket No. 45) at 1, stated that Count II alleges only a takings claim and should have invoked the Fifth Amendment rather than the Fourteenth Amendment. Counsel for the town argued that Count II could reasonably be read to assert a procedural due process claim in that the plaintiffs allege that the town failed to take action to protect

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<sup>1</sup> While the instant case does not involve a claim of “taking” by excessive regulation, the principle is the same. *Villager Pond*, (continued on next page)

them from a third person's actions that caused them harm. *See also* Town's Opposition at 3-4. A procedural due process claim would provide this court with subject matter jurisdiction. *See Culebras*, 813 F.2d at 516; *Lerman*, 675 F. Supp. at 16-17. Specifically, the town argues that the plaintiffs have suggested during discovery that the town violated their constitutional rights by failing to appoint one of them to the committee dealing with Jordan's use of his property. Town's Opposition at 3. However, it is the allegations of the complaint that control for purposes of this motion. *James v. Bellotti*, 733 F.2d 989, 992 (1st Cir. 1984). Nothing in those allegations suggests a procedural due process claim. Coupled with the plaintiffs' denial of any intention to state such a claim, this absence of allegations requires remand.

For the foregoing reasons, I recommend that the motion to remand be **GRANTED**.

#### **NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

Dated this 2nd day of October, 2001.

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David M. Cohen  
United States Magistrate Judge

KEVIN GUIDI

CURTIS WEBBER

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*Inc. v. Town of Darien*, 56 F.3d 375, 380 (2d Cir. 1995).

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v.

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